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**Medical Claim Conciliation Panel--A DEFENSE PERSPECTIVE**

By Edmund Burke

*Edmund Burke graduated from the U.S. Naval Academy (B.S., 1956) and University of California at Berkeley (Boalt Hall, 1963). He has practiced in Hawaii since 1966, specializing in medical malpractice, products liability, personal injury, and commercial litigation.*

When I first heard of the MCCP legislation in 1976, my reaction was absolutely negative. The idea of proceeding to a hearing of potentially complex issues of medical negligence with no discovery, no rules of evidence, and no binding result bordered on the ridiculous. The original hearings were almost traumatic involving such no-no's from trial practice as asking the opposing witnesses questions when you did not know the answer, listening to all kinds of hearsay on hearsay, and being confronted with written reports from opposing experts with no chance of cross examination. However, even without the rudimentary safeguards and procedures from a regular trial, it became evident that the basic facts of each case were placed on the table. The essentials of a case that would take 2 to 3 weeks to unfold before the jury were placed before the Panel in 3 to 4 hours. The give and take, comments, and questions from Panel members usually got to the heart of the matter and the decisions seemed to have a rational basis whether you agreed with them or not.

After watching this process through several cases, it soon became evident to me that many cases were being eliminated at the MCCP level and were not proceeding to suit. Most of the terminations were plaintiffs electing not to proceed to suit following an MCCP hearing. In some instances, the defense became convinced the case was a probable loser and settled. As a result of considerable experience in the process during the first year of operation, I was converted from a negative skeptic to a believer that the panel process did effectively eliminate non-meritorious claims and led to settlement of some, but not all, meritorious claims.

***Some benefits of the MCCP***

EARLY ELIMINATION OF FRIVOLOUS OR UNMERITORIOUS CLAIMS.

First of all, the parties receive from the MCCP process what they put into it. There are certain claimants and claimants' attorneys who look upon the MCCP as a temporary

impediment to filing suit. They do not present a case, expect to lose at the MCCP, and sometimes wind up in a costly lawsuit which they lose. There are, however, certain cases involving complex medical issues that do not readily lend themselves to the MCCP process when "the devil is in the detail" and extensive discovery is needed to get the details. In the vast majority of cases going through the process of retaining an expert and having the case professionally evaluated points up strengths and weaknesses to both sides.

The cases where the plaintiff elects not to proceed with suit after an MCCP decision usually fall into two categories. The first involves claimants who proceed without counsel primarily to determine why the medical care received was not successful. These individuals are dissatisfied with the result, and in many cases shocked and surprised over what they perceive to be the sudden death or catastrophic injury to a loved one. They are primarily looking for answers which the defendant doctor unfortunately did not explain at the time of treatment or the time of death. They are not so much accusing the doctor of negligence as seeking an answer to the question of whether there was negligence. The MCCP process, including any comments by the Panel members, is often effective in satisfactorily answering these questions and terminating the claim.

The second example is the case that claimant's attorney proceeds to the Panel hearing without expert support or only very weak expert support. When expert evidence is utilized at an MCCP hearing, it is commonly presented by way of written report. Alternative methods of presenting include the expert testifying by telephone conference call, especially when out of state, and on relatively rare occasions the expert appearing at the hearing. A full on hearing with testimony from all of the parties, supporting expert evidence, and submission of supporting medical literature gives the best prospect for a MCCP decision that reflects what a jury could be expected to do. One of the most important aspects of a well-conducted hearing is the opportunity to evaluate the witness quality of each party. In analyzing those cases that proceed no further after the MCCP, I have concluded that the plaintiffs have, for the first time, received a detailed explanation of why the bad result occurred and have been convinced that there was no wrongdoing. There may also be a change in the perception of the defendant doctor from the bad guy who caused the bad result to a reasonable person who did reasonable, rational things that proved unsuccessful.

From a defense viewpoint, certain well-presented plaintiff's cases plant the seeds for settlement. Even though a settlement may not be immediate and presuit, many of the motivating factors for an eventual settlement start out with impressions created at an MCCP hearing.

## ELIMINATION OF SOME OF THE PLAINTIFFS AND SOME OF THE DEFENDANTS IN MULTI-PARTY CASES.

A very common scenario in MCCP claims is the case where nearly all medical care providers involved in claimant's treatment are named as respondents. This occurs especially in those situations where counsel is retained at the last minute before the running of a two-year statute, and feels compelled to name everyone in sight with the idea of later dismissals. Even where there has been a selective naming of respondents, there are many cases in which a given doctor has explained his or her role so convincingly during the hearing that they are not included in a later lawsuit. In somewhat rare instances where multiple plaintiffs have

been included, the MCCP process may eliminate certain of the claimants. This is especially true in the mass tort cases such as silicon breast implants, Fen-Phen, etc.

STATISTICS SHOWING THE EFFECT OF THE MCCP PROCESS.

In evaluating the effectiveness of the MCCP process, it would be helpful to know what percentage of claims proceed no further after the MCCP decision. It would also be helpful to know how the MCCP decision correlates with verdicts and judgments if the case proceeds through suit. In Richard Fried's portion of this article, he describes the statistics indicating the percentage of cases that plaintiffs win or lose at the MCCP, and these statistics are contained in the annual report promulgated by the Department of Commerce and Consumer Affairs, State of Hawaii. Unfortunately, there are no published statistics that answer the above questions.

In the past, surveys have been taken, and in the early years of the MCCP, approximately 70 to 80% of the claims did not go on to lawsuits. I am advised by my insurance clients that although they have no hard and fast data on this point, roughly 55 to 60% of the MCCP claims currently do not proceed into lawsuits.

Obviously of the cases that do proceed to lawsuits, many involve claims in which the MCCP has found no actionable negligence. Approximately 36% of medical malpractice lawsuits against doctors are settled. Forty-four percent are terminated either through voluntary dismissal or summary judgment. Of those cases that proceed through trial to jury verdict, approximately 76% are decided in favor of the defense. The above percentages are fairly rough approximations since no organization is attempting to maintain precise statistical data in these areas. These statistics are applicable to doctors and not to hospitals or claims against Kaiser. Claims against Kaiser are usually processed through arbitration, not the court system.

From the available data, both as far as MCCP results and lawsuit results, it is obvious that medical malpractice cases present a real challenge for plaintiffs. Success requires thorough and expensive preparation, and primarily the selection of knowledgeable, honest, and articulate experts. Each case that survives summary judgment has one or more expert witnesses supporting plaintiff's cause. It is, therefore, not enough just to have a supporting expert.

Claimant's attorney should also be aware that a defendant doctor has virtual veto power over the settlement of a case because of the consent clause in most insurance policies. There are real consequences to consenting to settlement from a professional viewpoint such as being reported to the National Data Bank and to the State of Hawaii Regulated Industries Complaint Office (RICO). An adverse decision by the MCCP, by a court, or settlement each trigger reporting to RICO. That organization will then initiate its own investigation and in certain cases the doctor's medical license may be in jeopardy.

***Legislative modifications***

It is the filing of a medical malpractice claim with the MCCP that tolls the statute of limitations. The filing of a lawsuit before an MCCP decision will not toll the statute.[1]

[1] See *Tobosa v. Owens*, 69 Haw. 305, 741 P.2d 1280 (1987)

Originally, cases filed with the MCCP that were taken off calendar for a hearing could languish indefinitely under MCCP jurisdiction. H.R.S. § 671-18 corrected this potential for indefinite delay by limiting the MCCP jurisdiction to [12] months.[2] The Administrator notifies the parties at the end of ***[12]*** months that jurisdiction has been terminated, the statute of limitations is running again, and the claimant is free to file suit.

In order to foster meaningful hearings before the MCCP, H.R.S. § 671-19 provides that the Panel can determine when a party has not cooperated with the MCCP. If a lawsuit later follows, the trial court has discretion to sanction the non-cooperating party based upon the finding of lack of cooperation by the MCCP.

A filing of an MCCP claim against a doctor has the effect of requiring that doctor to disclose the fact of a claim in later applications for hospital staff privileges, insurance applications, etc. The MCCP has now been empowered to determine that certain MCCP claims are frivolous, thus allowing such claims to be expunged from the MCCP records.[3]

### *Conclusion*

The MCCP has proved beneficial in reducing the number of claims that would otherwise be initiated as lawsuits. The information learned by both plaintiffs and defendants during the MCCP process has facilitated the pretrial settlement of many cases. In order for the process to be effective, however, both sides need to be prepared and present at least the essence of the claim and the fundamental defense at the MCCP hearing. Since more cases are settled than tried, it is in the best interest of all parties to meaningfully share information through the MCCP process, as opposed to the lengthy discovery process in preparation for trial.

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[2] See also H.R.S. § 671-16.

[3] See H.R.S. § 671-15.5(a)